

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

SAMUEL BOWDEN,

Plaintiff,

V.

CAROLYN W. COLVIN, ACTING
COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,

Defendant.

No. CV 14-2682-PLA

MEMORANDUM OPINION AND ORDER

1.

PROCEEDINGS

Plaintiff filed this action on April 15, 2014, seeking review of the Commissioner's denial of his application for Supplemental Security Income ("SSI") payments. The parties filed Consents to proceed before the undersigned Magistrate Judge on May 20, 2014, and May 27, 2014. Pursuant to the Court's Order, the parties filed a Joint Stipulation on April 1, 2015, that addresses their positions concerning the disputed issue in the case. The Court has taken the Joint Stipulation under submission without oral argument.

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1 II.

2 **BACKGROUND**

3 Plaintiff was born on March 5, 1961. [Administrative Record (“AR”) at 22.] He has past
4 relevant work experience as a warehouse worker and a casting operator. [AR at 22, 60-61.]

5 On September 23, 2010, plaintiff filed an application for SSI payments, alleging that he has
6 been unable to work since April 16, 2006. [AR at 17, 234.] After his application was denied
7 initially and upon reconsideration, plaintiff timely filed a request for a hearing before an
8 Administrative Law Judge (“ALJ”). [AR at 17, 187-89.] A video hearing was held on October 17,
9 2012, at which time plaintiff appeared represented by an attorney, and testified on his own behalf.
10 [AR at 38-69.] A vocational expert (“VE”) also testified. [AR at 58-68.] On October 26, 2012, the
11 ALJ issued a decision concluding that plaintiff was not under a disability from September 23, 2010,
12 the date the application was filed. [AR at 17-24.] Plaintiff requested review of the ALJ’s decision
13 by the Appeals Council. [AR at 13.] When the Appeals Council denied plaintiff’s request for
14 review on February 4, 2014 [AR at 2-7], the ALJ’s decision became the final decision of the
15 Commissioner. See Sam v. Astrue, 550 F.3d 808, 810 (9th Cir. 2008) (per curiam) (citations
16 omitted). This action followed.

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18 III.

19 **STANDARD OF REVIEW**

20 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s
21 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial
22 evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622
23 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

24 “Substantial evidence means more than a mere scintilla but less than a preponderance; it
25 is such relevant evidence as a reasonable mind might accept as adequate to support a
26 conclusion.” Carmickle v. Comm’r, Soc. Sec. Admin., 533 F.3d 1155, 1159 (9th Cir. 2008) (citation
27 and internal quotation marks omitted); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998)
28 (same). When determining whether substantial evidence exists to support the Commissioner’s

1 decision, the Court examines the administrative record as a whole, considering adverse as well
 2 as supporting evidence. Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001) (citation omitted);
 3 see Ryan v. Comm’r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008) (“[A] reviewing court must
 4 consider the entire record as a whole and may not affirm simply by isolating a specific quantum
 5 of supporting evidence.”) (citation and internal quotation marks omitted). “Where evidence is
 6 susceptible to more than one rational interpretation, the ALJ’s decision should be upheld.” Ryan,
 7 528 F.3d at 1198 (citation and internal quotation marks omitted); see Robbins v. Soc. Sec. Admin.,
 8 466 F.3d 880, 882 (9th Cir. 2006) (“If the evidence can support either affirming or reversing the
 9 ALJ’s conclusion, [the reviewing court] may not substitute [its] judgment for that of the ALJ.”)
 10 (citation omitted).

11 12 IV.

13 THE EVALUATION OF DISABILITY

14 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable
 15 to engage in any substantial gainful activity owing to a physical or mental impairment that is
 16 expected to result in death or which has lasted or is expected to last for a continuous period of at
 17 least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
 18 1992).

19 20 A. THE FIVE-STEP EVALUATION PROCESS

21 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing
 22 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,
 23 828 n.5 (9th Cir. 1995), as amended April 9, 1996. In the first step, the Commissioner must
 24 determine whether the claimant is currently engaged in substantial gainful activity; if so, the
 25 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in
 26 substantial gainful activity, the second step requires the Commissioner to determine whether the
 27 claimant has a “severe” impairment or combination of impairments significantly limiting his ability
 28 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.

1 If the claimant has a “severe” impairment or combination of impairments, the third step requires
 2 the Commissioner to determine whether the impairment or combination of impairments meets or
 3 equals an impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. part 404,
 4 subpart P, appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If
 5 the claimant’s impairment or combination of impairments does not meet or equal an impairment
 6 in the Listing, the fourth step requires the Commissioner to determine whether the claimant has
 7 sufficient “residual functional capacity” to perform his past work; if so, the claimant is not disabled
 8 and the claim is denied. Id. The claimant has the burden of proving that he is unable to perform
 9 past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie
 10 case of disability is established. Id. The Commissioner then bears the burden of establishing
 11 that the claimant is not disabled, because he can perform other substantial gainful work available
 12 in the national economy. Id. The determination of this issue comprises the fifth and final step
 13 in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin,
 14 966 F.2d at 1257.

15 16 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

17 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since
 18 September 23, 2010, the application date. [AR at 19.] At step two, the ALJ concluded that plaintiff
 19 has the severe impairments of chronic low back pain; degenerative disc disease of the
 20 lumbosacral spine with radiculopathy; and obesity. [AR at 20.] At step three, the ALJ determined
 21 that plaintiff does not have an impairment or a combination of impairments that meets or medically
 22 equals any of the impairments in the Listings. [Id.] The ALJ further found that plaintiff retained
 23 the residual functional capacity (“RFC”)¹ to perform light work as defined in 20 C.F.R. §
 24

25
 26 ¹ RFC is what a claimant can still do despite existing exertional and nonexertional
 27 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). “Between steps
 28 three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which
 the ALJ assesses the claimant’s residual functional capacity.” Massachi v. Astrue, 486 F.3d 1149,
 1151 n.2 (9th Cir. 2007) (citation omitted).

1 416.967(b),² except as follows:

2 [S]tanding/walking 4 hours in an eight-hour work day with the need of a cane for
3 balancing, changing of positions every 30 minutes, no climbing of ladders/ropes,
4 kneeling or crawling, occasional climbing of ramps/stairs, balancing and stooping,
frequent crouching, occasional reaching overhead bilaterally and with avoidance of
working at unprotected heights or around dangerous moving machinery.

5 [AR at 21.] At step four, based on plaintiff's RFC and the testimony of the VE, the ALJ concluded
6 that plaintiff is unable to perform any of his past relevant work as a warehouse worker or a casting
7 operator. [AR at 22, 60-62.] At step five, based on plaintiff's RFC, vocational factors, and the
8 VE's testimony, the ALJ found that there are light occupational jobs existing in significant numbers
9 in the national economy that plaintiff can perform, including work as a "marker"³ (Dictionary of
10 Occupational Titles ("DOT") No. 209.587-034), "parking lot cashier" (DOT No. 211.462-010), and
11 "garment folder" (DOT No. 789.687-066). [AR at 23, 62-63.] Based on a hypothetical to the VE
12 restricting the range of work to a limited sedentary position⁴ [AR at 63], the ALJ found that plaintiff
13 could alternatively perform such positions as "parking lot cashier" (DOT No. 211.462-010);⁵ "call-
14 out operator" (DOT No. 237.367-014); and "jewelry repairer" (DOT No. 700.687-062). [AR at 23,
15 63-64.]

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18 ² "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying
19 of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in
20 this category when it requires a good deal of walking or standing, or when it involves sitting most
21 of the time with some pushing and pulling of arm or leg controls. To be considered capable of
22 performing a full or wide range of light work, you must have the ability to do substantially all of
these activities. If someone can do light work, we determine that he or she can also do sedentary
work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for
long periods of time." 20 C.F.R. § 416.967(b).

23 ³ The decision describes this position as "market labeler," and transposed the DOT number
24 testified to by the VE. [Compare AR at 23 ("DOT # 290-587-034") with AR at 62 (DOT No.
"209.587-034").] A review of the DOT job number, as well as the testimony of the VE, shows that
the VE described the position of "marker or . . . labeler," DOT No. 209.587-034. [AR at 62.]

25 ⁴ In his first hypothetical to the VE, the ALJ limited lifting to twenty pounds occasionally, and
26 ten pounds frequently; in the second hypothetical, lifting was limited to ten pounds occasionally,
and less than ten pounds frequently. [AR at 61-63.] Otherwise they contained identical limitations.

27 ⁵ The VE testified that although considered light work, as commonly performed this position
28 would still meet the hypothetical RFC for sedentary work. [AR at 64.]

1 Accordingly, the ALJ determined that plaintiff was not disabled at any time from September
2 23, 2010, the date the application was filed. [AR at 23.]

3
4 **V.**

5 **THE ALJ'S DECISION**

6 Plaintiff contends that the ALJ erred when he determined that plaintiff could perform the
7 alternative work activity of marker, parking lot cashier, and garment folder, in light of the RFC
8 limitation to no more than occasional overhead reaching with either upper extremity. [JS at 5-6.]

9 As set forth below, the Court respectfully disagrees with plaintiff and affirms the decision
10 of the ALJ.

11
12 **A. DOT INCONSISTENCY**

13 The DOT raises a presumption as to job classification requirements. See Johnson v.
14 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995); see also Pinto v. Massanari, 249 F.3d 840, 845-46
15 (9th Cir. 2001) (“[T]he best source for how a job is generally performed is usually the [DOT].”) (citations omitted). In order for “an ALJ to rely on a job description in the [DOT] that fails to comport
16 with a [plaintiff]’s noted limitations, the ALJ must definitively explain this deviation” and “the record
17 must contain persuasive evidence to support [it].” Pinto, 249 F.3d at 846, 847 (citation and internal
18 quotation marks omitted). Additionally, the Commissioner’s Rulings unambiguously provide that
19 when a VE provides evidence about the requirements of a job or occupation, the adjudicator has
20 an affirmative responsibility to ask about any possible conflict between that VE evidence and the
21 information provided in the DOT. Soc. Sec. Ruling (“SSR”) ⁶ 00-4p. SSR 00-4p further provides
22 that the adjudicator will ask the VE “if the evidence . . . she has provided” conflicts with information
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25 ⁶ The Commissioner issues SSRs “to clarify the Act’s implementing regulations and the
26 agency’s policies. SSRs are binding on all components of the [Social Security Administration].
27 SSRs do not have the force of law. However, because they represent the Commissioner’s
28 interpretation of the agency’s regulations, we give them some deference. We will not defer to
SSRs if they are inconsistent with the statute or regulations.” Holohan v. Massanari, 246 F.3d
1195, 1202 n.1 (9th Cir. 2001) (internal citations omitted).

provided in the DOT and obtain a reasonable explanation for any apparent conflict. Id.; see also Massachi, 486 F.3d at 1152-53.

B. ANALYSIS

Plaintiff contends that the ALJ's RFC determination would preclude him from performing the "alternative work" suggested by the VE. [JS at 6-12.] Specifically, plaintiff contends that based on the DOT requirements for each position, the occupations of marker, parking lot cashier, and garment folder require frequent and/or constant "use of both upper extremities to reach overhead." [JS at 6.] Plaintiff argues that each of these jobs, therefore, has requirements beyond those of what he is capable of performing because of the RFC limitation to only *occasional* overhead reaching bilaterally. [JS at 6-7.] He also contends that because neither the ALJ nor the VE articulated reasons for deviating from the DOT job descriptions, the ALJ erred in finding that plaintiff could perform these jobs. [JS at 8-12.] Plaintiff does not discuss the DOT requirements for the alternative sedentary occupations of call-out operator and jewelry repairer which, based on the VE's testimony, the ALJ found plaintiff could also perform. [See generally JS at 6-12; AR at 23.]

Defendant contends that plaintiff "fails to appreciate the difference between the general 'reaching' and the specific ['reaching overhead.']" [JS at 13.] Defendant argues that because there is nothing in the DOT description of the jobs the ALJ found plaintiff could perform that would indicate that the frequent or constant reaching requirement means that the reaching is always *overhead* reaching, and because overhead reaching is a "subset" of reaching, there is no conflict between the VE's testimony and the DOT. [JS at 12-15.] Defendant also specifically discusses the descriptions for the sedentary job of jewelry repairer and the light/sedentary job of parking lot cashier as providing evidence that the described tasks for those positions would not include a significant amount of overhead reaching. [Id.] Like plaintiff, defendant does not discuss the DOT requirements for the sedentary position of call-out operator.

Even if the Court assumes, without deciding, that the RFC limitation to occasional overhead reaching bilaterally precludes plaintiff from being able to perform the occupations of marker,

1 parking lot cashier (light or sedentary), garment folder, and jewelry repairer, a review of all of the
 2 occupations the ALJ found plaintiff can perform shows that the sedentary position of “call-out
 3 operator” requires only *occasional* reaching. DOT No. 237.367-014; see also 20 C.F.R. §
 4 416.967(b) (if someone can do light work, the agency determines that he can also do sedentary
 5 work unless there are additional limiting factors -- not present here -- such as loss of fine dexterity
 6 or inability to sit for long periods of time). Accordingly, even if the ALJ erred in finding that plaintiff
 7 was capable of performing all of the other occupations, any error was harmless because the call-
 8 out operator occupation -- with 1,400 positions locally (defined by the VE as the counties of Los
 9 Angeles, Orange, San Bernardino, and Riverside [AR at 68]), and 210,000 positions nationally [AR
 10 at 64]⁷ -- requires only *occasional* reaching, consistent with plaintiff’s RFC limitation to *occasional*
 11 overhead reaching bilaterally. Thus, plaintiff could perform this occupation even if all of the
 12 reaching for that position is overhead reaching bilaterally, which, based on the task description for
 13 that position,⁸ is unlikely.

14 Accordingly, the Court finds that the VE’s testimony that plaintiff could perform the call-out
 15 operator job did not conflict with the DOT, or with plaintiff’s RFC limitation and, therefore, the ALJ

17 ⁷ In Beltran v. Astrue, the court stated that where jobs are “‘very rare’ or generally unavailable
 18 to the claimant due to his limitations,” an ALJ errs in finding that significant numbers of jobs exist.
 19 Beltran, 700 F.3d 386, 389 (9th Cir. 2010). The Beltran court determined that 135 jobs in the
 20 region where the claimant lived did not constitute “significant numbers” of jobs. Id. at 390 (citing
 21 Walker v. Matthews, 546 F.2d 814, 820 (9th Cir. 1976)). The court also found that if 135 jobs in
 22 one of the largest regions in the nation (Los Angeles) is not significant, then 1,680 jobs distributed
 23 nationally “over several regions” “cannot be a ‘significant number,’ either.” Id. If *either* the regional
 24 or national number is “significant,” then the ALJ’s decision will be upheld. Id. The Beltran court
 25 noted that it had previously found that 1,266 jobs regionally was a significant number; that 1,300
 jobs in the Oregon region and 622,000 jobs in the national economy was significant; and that
 2,300 jobs regionally and 64,000 nationally was significant. Id. at 389 (citing Barker v. Sec’y of
Health & Human Servs., 882 F.2d 1474, 1470 (9th Cir. 1989), Thomas v. Barnhart, 278 F.3d 947,
 960 (9th Cir. 2002), Moncada v. Chater, 60 F.3d 521, 524 (9th Cir. 1995)). Based on the
 foregoing, the Court finds that 1,400 call-out operator positions locally and 210,000 positions
 nationally constitute a significant number of available jobs.

26 ⁸ A call-out operator “compiles credit information, such as status of credit accounts, personal
 27 references, and bank accounts to fulfill subscribers’ requests, using telephone. Copies information
 28 onto form to update information for credit record on file, or for computer input. Telephones subscriber
 to relay requested information or submits data obtained for typewritten report to subscriber.” DOT No.
 237.367-014.

1 did not err in relying on that testimony. Remand is not warranted.

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3 **VI.**


4 **CONCLUSION**

5 **IT IS HEREBY ORDERED** that: (1) plaintiff's request for reversal, or in the alternative,
6 remand, is denied; and (2) the decision of the Commissioner is affirmed.

7 **IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the
8 Judgment herein on all parties or their counsel.

9 **This Memorandum Opinion and Order is not intended for publication, nor is it**
10 **intended to be included in or submitted to any online service such as Westlaw or Lexis.**

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12 DATED: April 13, 2015



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PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE